Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

Comments of Level 3 Communications, LLC

Patricia Paoletta
William P. Hunt, III
Level 3 Communications, LLC
1025 Eldorado Drive
Broomfield, CO 80021

Andrew D. Lipman
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

August 27, 1999

Table of Contents

Executive Summary

As a competitive, facilities-based provider of innovative telecommunications and information services, Level 3 supports the Commission's efforts to develop rules that promote competition and customer choice in telecommunications markets. Access to inside wiring and multiple tenant environments ("MTEs") is a critical competitive issue since it affects customers' abilities to access their chosen service provider and competitors' abilities to serve those customers.

There are two major obstacles in the way of Level 3 obtaining access to inside wiring and MTEs – ILECs and building owners/managers. If the Commission wants to further facilities-based competition in local markets, it must remove these obstacles. In these comments, Level 3 proposes a nondiscriminatory building access rule and additional incumbent LEC unbundling requirements to open the last 100 feet of the local loop to competition. Building owners/managers should be prohibited from imposing fees, terms and conditions on competitive carriers unless those fees, terms and conditions are also imposed on incumbent carriers. Although the Commission should not set the rates building owners/managers charge for access, it should require that those rates be cost-based and nondiscriminatory and adopt a presumption that revenue sharing arrangements are *per se* unreasonable.

The Commission should require incumbent LECs to provide competing carriers with access to unbundled inside wiring and in-building conduit. The Commission should also require incumbent LECs to provide access to both public and private rights-of-way and

expand, upon request by a competing carrier, any right-of-way, whether obtained by eminent domain or granted by contract, license, or easement (express or implied).

The Commission has authority under Sections 2(a), 4(i), 224 and 251 of the Act to adopt these rules. A nondiscriminatory access requirement is not a *per se* taking because building owners/managers have already acquiesced to incumbent LEC invasion of their property. Nor does a nondiscriminatory access rule deprive building owners/managers of the value of their property, or diminish in any way their investment expectations. To the contrary, a nondiscrimination requirement will enhance the value of MTEs because building owners will be able to offer their tenants greater choice in telecommunications service providers and receive reasonable fees from multiple carriers.

Without a nondiscriminatory access rule, building owners/managers will be able to exercise their bottleneck control over the last 100 feet of the local loop to prevent facilities-based competitive carriers from serving end users in MTEs and the Commission's efforts to fully implement Section 224, and meet the pro-competitive goals of the 1996 Act, will be thwarted. The Commission's authority to adopt a nondiscriminatory access rule, and exercise jurisdiction over private property owners, is implied in Section 224.

Because building owners and managers have consented to a "physical invasion" by admitting the incumbent LEC onto their premises, the Commission may promulgate rules governing the economic relationship between these landlords and tenants to further the legitimate state interest of opening all telecommunications markets to competition. Level 3 commends the Commission for issuing its FNPRM and urges it to take swift action to adopt the rules proposed in Level 3's comments.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

Comments of Level 3 Communications, LLC

Pursuant to Section 1.415 of the Commission's rules, Level 3 Communications, LLC ("Level 3") submits these initial comments in response to the Commission's Further Notice of Proposed Rulemaking[1] in the above-captioned proceeding.

---

[1] *Promotion of Competitive Networks in Local Telecommunications Markets, et al*, WT Docket No. 99-217, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999) ("FNPRM").

I. Introduction and Background

As a competitive provider of innovative telecommunications and information services, Level 3 supports the Commission's efforts to develop rules that promote competition in telecommunications markets and customer choice. Access to inside wiring and multiple tenant environments ("MTEs") is a critical competitive issue since it affects customers' abilities to access their chosen service provider and competitors' abilities to serve those customers. Unbundling incumbent local exchange carrier ("LEC") networks, mandating cost-based interconnection, and requiring incumbent LECs to provide creative and cost-based collocation options will not introduce competition in local markets if the incumbent LEC or building owner can block access to the customer. In short, all of the Commission's hard work to open the local markets to competition is still being blocked, in some instances, by monopoly control over the last 100 feet needed to provide competitive services directly to consumers.

As a facilities-based carrier, Level 3 is constructing its own local networks and prefers to serve its customers over its own facilities. Because Level 3 brings competitive alternatives to customers using Internet Protocol ("IP") technology, Level 3 is able to offer innovative advanced telecommunications and information services that are not supported by traditional 2-wire copper loops. Thus even where inside wiring is available, and Level 3 has been permitted to use it, existing wiring may be technically inadequate to support these advanced, IP services. For these reasons, Level 3 would prefer to extend its state-of-the-art network to the customer premise by deploying its own inside wiring in MTEs. However, given the practical difficulties associated with rewiring a mature, occupied

building, Level 3 realizes that in many instances it will have to rely on existing wiring to reach its customers.

There are two major obstacles in the way of Level 3 obtaining access to such wiring or installing its own wiring – ILECs and building owners/landlords. If the Commission wants to further facilities-based competition in local markets, it must remove these obstacles. In these comments, Level 3 summarizes its experience negotiating building access and access to inside wiring, proposes rules to open the last 100 feet of the local loop to competition, and analyzes the Commission's statutory authority to enact such rules. Level 3 commends the Commission for issuing its FNPRM and urges it to take swift action to adopt these rules.

II. Level 3's Experience Negotiating Inside Wiring/Building Access and Proposed Rules

A. Level 3's Experience Negotiating Building Access and Access to Inside Wiring

Level 3 is building an advanced fiber optic network designed around IP technology across the U.S., and in Europe and Asia. The Level 3 network will combine both local and long distance networks connecting customers end-to-end. Level 3's facilities-based local metropolitan networks are operational in 17 U.S. and 4 European cities and are expected to include 50 U.S. and 21 international cities when completed. Level 3 offers services in 26 markets, with gateway facilities in 24 of those 26 markets. Level 3's gateway facilities house Level 3's local sales staff, operational staff, and transmission and IP routing/switching equipment.

Although some facilities-based competitive LECs have used resale as an initial market entry strategy, Level 3 has not and cannot pursue that strategy. Incumbent LECs generally do not provide the advanced, high bandwidth telecommunications and information services Level 3 offers its customers. Because Level 3 cannot merely resell existing incumbent LEC services, it is therefore imperative that Level 3 gain either unbundled access to existing facilities within an MTE or be permitted access to install its own facilities. Without such access, Level 3 will be prevented from offering its innovative services to end users in MTEs.

In most MTEs, the incumbent LEC has installed and continues to own and operate facilities, including entrance facilities (connecting the LEC's outside plant to the building's minimum point of entry ("MPOE")), a common block or Network Interface Device ("NID") where the entrance facilities can be cross-connected to inside wiring, vertical riser cables to upper floors of the building, horizontal distribution wires connecting the risers to individual tenants' premises, and telephone closets. Depending on the age of the building and practice of the incumbent LEC, some of these facilities are on the customer side of the demarcation point. Nevertheless, the facilities are generally owned and maintained by the incumbent LEC on a deregulated basis. All of these facilities are integral to the provision of interstate telecommunications service to individual customers located within MTEs. Without access to these facilities, or access to the building to deploy its own facilities, Level 3 is prevented from offering its advanced telecommunications and information services to individual customers located within an MTE.

Only in limited instances has Level 3 has been able to use inside wire abandoned by other carriers. Even where abandoned inside wire is available, the wiring is often old,

unreliable, and technologically incapable of delivering the innovative high bandwidth services Level 3 provides its customers. Newer buildings often have available riser shafts and, if it successfully negotiates access to those newer buildings, Level 3 will pull its conduit through the same riser (both vertical and horizontal) used by other telecommunications carriers. To date, Level 3 has not experienced spectrum interference or other control problems with the conduit it has installed in shared riser shafts.

Without access to customers in MTEs, Level 3's substantial investment in its local networks will be impaired or negatively impacted. As a new entrant that is aggressively deploying a facilities-based network, Level 3 is forced to accept inadequate or inequitable building access agreements in order to gain access to a customer or build up its potential customer base. Although Level 3 has negotiated building access to MTEs in some instances, many of the agreements Level 3 has reached have been less than satisfactory, imposing terms and conditions that require Level 3 to make an excessive capital investment in a single building merely to gain access to it. For example, most building owners/managers try to reserve the right to install a central distribution system ("CDS"). While installing one CDS in a building could be more efficient in the long run, requiring carriers to deploy their own inside wiring and in-building conduit, and then abandon that wiring and conduit and fund a CDS, is economically inefficient and has the potential to strand valuable capital resources.

B. Proposed Rules

Based on its experience negotiating access to MTEs and inside wiring, Level 3 recommends that the Commission amend its rules to require incumbent LECs to provide

unbundled access to facilities and rights-of-way they own or control within MTEs and other buildings. Furthermore, the Commission should adopt rules that restrict building owners and managers from frustrating the Commission's unbundled access requirements. Level 3 sets forth its proposed rules below and addresses the Commission's authority to adopt such rules in Section III of these comments.

As a general matter, the Commission should require all building owners to permit nondiscriminatory access to their buildings. If a building owner grants one telecommunications service provider a right to enter the premises and install telephone closets, inside wiring and riser conduit, the owner must grant all telecommunications service providers access on the same terms, conditions, and rates. The rules should also be technology-neutral. Given the convergence of voice, data and video, the Commission may wish to adopt a nondiscriminatory access rule that grants access to all providers of communication by wire or radio.

Nothing in the rules should prohibit building owners and managers from adopting reasonable, nondiscriminatory requirements to address space exhaustion, safety, engineering, and liability concerns. Nothing in the rules should require building owners and managers to pay for the construction or maintenance costs of a carrier's network in the building. The rules should also permit building owners and managers to operate a CDS and to charge fees for use of that system, as long as use of the CDS is not mandatory. Building owners and managers should be prohibited, however, from entering into exclusive contracts and from requiring the presence of a customer within the building before access is granted.

Although the Commission should not, at this time, regulate the rates charged for building access, it should adopt guiding principles that building owners and managers must follow. First, the rates must be nondiscriminatory. Second, rates must be cost-based. Third, the Commission should adopt a presumption that revenue sharing is *per se* unreasonable because it does not approximate cost-based pricing.[2]

The Commission should also include inside wiring and in-building conduit as network elements that incumbent LECs must unbundle. It has been Level 3's experience that many incumbent LECs will not provide a competitor unbundled access to a network element unless that element has been identified by the Commission or a state commission as subject to Section 251(c)'s unbundling requirement.[3] For this reason, Level 3 urged the Commission to include inside wiring on its national minimum list of network elements incumbent LECs must unbundle.[4]

Inside wiring and in-building conduit are facilities used in the provision of a telecommunications service. Although the incumbent LEC may not own the facility itself, it often, if not always, controls the facility. Access to incumbent LEC inside wiring and in-

---

[2] The conclusion that revenue sharing is *per se* unreasonable is supported by Congress's rejection of a statutory provision that would have required local governments to impose a percentage of revenue fee on telecommunications service providers regardless of how much public rights-of-way they used. *See, AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp.2d 582, 594 (N.D. Tx. 1998).

[3] Some States have required the unbundling of in-building wiring, including Florida, Georgia, Kentucky, Louisiana, New York, and Tennessee.

[4] *See*, Comments of Level 3 Communications, LLC at 20, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (May 26, 1999).

building conduit is necessary because in most MTEs competitive carriers will not be able to provide service if they must rewire the building. In many cases, practical considerations may make such rewiring prohibitively expensive or preclude rewiring altogether. These facilities are not proprietary and the cost and inconvenience of duplicating them is materially greater than obtaining them from incumbent LECs.

The Commission should also amend its rules to make clear that incumbent LECs must provide access to both public and private rights-of-way under Section 224. The statue, by its terms, does not differentiate between public and private rights-of-way. Therefore, the Commission rules should require access to both. For instance, incumbent LECs should be required to expand their right-of-way upon request by a competitor whether that right-of-way is public, private, obtained by eminent domain, or granted by contract, license, or easement (express or implied). The Commission must also adopt national minimum standards and require States that wish to regulate in this area certify that their rules comply with the Commission's minimum standards.

As explained in more detail in Section III of these comments, Sections 251 and 224 grant the Commission ample authority to adopt these rules. Although the Commission has taken some steps to implement Section 224, it has not adopted regulations to address the full breadth of that Section's potential. In the face of evidence that competition in local markets is being stymied by bottleneck control over the last 100 feet, the Commission must now take steps to fully implement Section 224.

III. Commission Jurisdiction to Regulate Building Access and Inside Wiring

A. Section 224 Authority

Although the Commission has already adopted rules governing the installation, maintenance, and ownership of inside wiring,[5] it has not yet adopted rules to facilitate a competitive provider's access to such inside wiring. The Commission clearly has authority under Section 224 to require access to the conduit used to support inside wiring and to rights-of-way used to install and maintain such wiring. Section 224(f)(1) requires an incumbent LEC to provide telecommunications carriers with access to "any pole, duct, conduit or right-of-way" the incumbent LEC owns or controls. Section 224 does not specifically define poles, ducts, conduits or rights-of-way. Although the Commission has, to date, narrowly construed these terms, it is clear that it must reconsider those determinations in light of the evidence that the last 100 feet is quickly becoming a bottleneck that threatens to derail the pro-competitive goals of the 1996 Act.

In order to provide competitive LECs access to the last 100 feet, the Commission should amend its rules to define conduit as any pipe, tube, or similar object buried or in-building, used to support wire communications. The Commission also should find that rights-of-way may encompass both public and private rights-of-way, including rights-of-way over the incumbent LEC's own property. As the courts have recognized, the phrase right-of-way encompasses an easement over another party's property.[6] Thus the Commission's

---

[5] *See, e.g., Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Memorandum Opinion and Order, 1 FCC Rcd 1190, 1195 (1986) (deregulating the maintenance of both complex and simple inside wiring and the installation of simple inside wiring); 47 C.F.R. §§ 68.213, 68.215 (technical standards for installing and maintaining simple and complex inside wiring).

definition of a right-of-way must include all rights-of-way, public and private, whether obtained by eminent domain, contract, license, or easement (express or implied).

B. Commission Regulatory Authority Over Private Property

Contrary to the Commission's stated concerns, interpreting Section 224 to include rights-of-way and conduit on third-party premises need not raise difficult questions of implementation. The Commission has already recognized that Section 224(f)(1) was enacted to ensure that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[7] Thus no party, including a building owner or manager, is immune from the access requirements set forth in Section 224.

The Commission has already exercised control over the private property of building owners and managers and promulgated regulations governing private parties that do not provide telecommunications services, as exemplified by the following cases:

Equipment Standards: The Commission has exercised extensive authority over the property of incumbent carriers under both its general public interest authority as well as specific statutory language. In addition to carriers' property, the Commission has exercised

---

[6] FNPRM at ¶ 42 and n. 94 (citing caselaw).

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, ¶ 1123 (1996), *rev'd in part, Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

jurisdiction, and the courts have upheld such jurisdiction, over non-carriers' private property in its regulation of equipment registration and promulgation of equipment standards.[8]

Demarcation Point: The Commission has already exercised jurisdiction over building owners and managers by limiting their right to establish the demarcation point where carrier facilities end and customer premise facilities begin.[9]

RBOC Capitalization Plans for Equipment Subsidiaries: The Commission has required RBOCs to file capitalization plans for equipment subsidiaries even though the Act did not explicitly grant the Commission jurisdiction over holding companies that do not provide telecommunications services.[10]

Without restrictions on a building owner/manager's ability to exclude competitive carriers, any Commission requirement that an incumbent LEC unbundle inside wiring or provide access to in-building conduit and private rights-of-way would be meaningless. The Commission's authority to regulate building access is implicit in Section 224.

C. General Rulemaking Authority

In addition to Section 224, Section 2(a) grants the Commission broad authority to regulate all interstate communications by wire or radio and all persons who engage in such

---

[8] *See North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977). *See also* 47 C.F.R. §§ 68.200-68.226.

[9] *See* 47 C.F.R. §§ 68.3, 68.213.

[10] *American Information Technologies, Inc., et al., Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services*, 102 FCC.2d 1089 (1985), *aff'd, North American Telecommunications Association v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)

communication or transmission. In construing Section 2(a), the Courts have recognized that:

> Congress in 1934 acted in a field that was demonstrably both new and dynamic, and it therefore gave the Commission a comprehensive mandate, with not niggardly but expansive powers.[11]

Section 4(i) also grants the Commission broad authority to adopt such rules or policies, not otherwise inconsistent with law, as it deems necessary to implement provisions of the Act.

> Section 4(i) empowers the Commission to deal with the unforeseen – even if it [ ] means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries.

North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

The Commission often has relied on these statutory provisions when promulgating regulations not explicitly mandated by the Act, as exemplified by the following cases:

Expansion of Broadcast Authority to CATV: Before Congress amended the Act to grant the Commission explicit jurisdiction to regulate cable television providers, the Commission exercised its authority under Sections 4(i) and 303(r) to promulgate carriage requirements and reasonable nonduplication obligations on community antenna television ("CATV") systems.[12]

---

[11] *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (internal quotations and citations omitted).

[12] *See, Rules re: Microwave TV*, Docket Nos. 14895 and 15233, First Report and Order, 38 FCC 683 (1965); *CATV*, Docket Nos. 14895, 1533, and 15971, Second Report and Order, 2 FCC2d 725 (1966).

Cable Home Run Wiring: In adopting the cable home run wiring rules, the Commission relied on Sections 4(i) and 303(r) of the Act to justify rules that were not expressly prohibited by the Act and necessary to implement several provisions of the Act to broaden the range of competitive opportunities in the multichannel video distribution marketplace.[13]

Taken together, Sections 2(a) and 4(i) of the Act provide the Commission with authority to adopt nondiscriminatory building access regulations, even where Congress did not specifically direct the Commission to establish such regulations. As the Supreme Court affirmed, the broad authority Congress granted the Commission in the Communications Act of 1934, as amended, includes the authority to enact regulations implementing the 1996 Act. *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 730 (1999). Without Commission action to release from bottleneck control the last 100 feet of the local loop, the Congressional goal of opening local markets to competition will be thwarted. The Commission must exercise its statutory jurisdiction under Sections 2(a), 4(i), and 224 to open local markets to competition.

IV. Prohibiting Discriminatory Access Is Not a Taking

As shown below, prohibiting discriminatory access is not an unconstitutional taking. Under Level 3's proposal, building owners and managers would be permitted to deny access to all telecommunications carriers. However, once a building owner or manager

---

[13] *Telecommunications Services Inside Wiring*, CS Docket No. 95-184, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, *recon. pending, appeal pending sub nom. Charter Communications, Inc. v. FCC* (8th Cir., Case No. 97-4120).

permitted one carrier to access the premises, it would be required to permit other carriers access on the same rates, terms and conditions.

A. Analysis of Takings Caselaw

The Supreme Court, while acknowledging that no single test exists, has identified four major factors that it considers significant in the ad hoc, fact-based analysis of whether a particular government action constitutes a taking:

Physical Invasion: Regulations that compel the property owner to suffer a physical "invasion" of his property are often considered a taking and just compensation is required.[14]

Destruction of Economic Value: Regulations that destroy the economic value of property or deprive a property owner of all economically viable uses of his property have been viewed as takings.[15]

Investment Expectations: Regulations that interfere with the investment expectations of property owners may be considered takings.[16]

Character of Government Action: The courts often find a taking has occurred where the government action burdens a small group of individuals for the benefit of the public at large.[17] Under this line of cases, economic regulation in the public interest that impacts the

---

[14] *Lucas v. South Carolina Coastal Commission*, 112 S. Ct. 2886, 2893 (1992) (*citing Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982)).

[15] *Id.* at 2894-95

[16] *Id.* at 2895, n. 8.

[17] *Yee v City of Escondido, California*, 112 S. Ct. 1522, 1529 (1992).

property of a broad class – such as commercial building owners – is constitutionally permissible.

The first category of cases, where the government authorizes a physical occupation of property, requires analysis of whether the property owner has been afforded just compensation. However, if the government is regulating the use of private property, the courts traditionally engage in a complex factual assessment of the remaining three factors.

B. A Nondiscriminatory Access Regulation Is Not a "Physical Invasion"

Level 3's proposed nondiscriminatory access rule does not meet the Court's traditional criteria for a *per se* taking. Where a private property owner has acquiesced to physical occupations by a member of a particular class, the government can require that additional members of that class have the same access.[18] Building owners and managers have already consented to an "invasion" by incumbent LECs, and in many cases, by competitive LECs as well. Therefore, under this reasoning, where a building owner has acquiesced to physical occupations by telecommunications service providers, the Commission may regulate the economic relationship between the building owner or manager (landlord) and the telecommunications service provider (commercial lessee).

The Supreme Court has found that a "physical invasion" or *per se* taking exists only when the property owner has no right to prevent the occupation of the property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court found that a minor but permanent physical occupation of an owner's property authorized by the government is a taking of property for which just compensation is due. 102 S. Ct. 3164 (1982). The statute

[18] *Id.*

considered by the Court required landlords to permit permanent occupation of their property by cable companies' cables in exchange for compensation determined by a state regulatory authority. In finding that the compelled occupation constituted a *per se* taking, the Court stated:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.

Loretto, 102 S. Ct. at 3179. However, since compensation was paid to the building owners, the taking was not illegal.[19] Likewise, the Commission can require that building owners make access to their property available on a nondiscriminatory basis so long as such access is compensated.

In *FCC v. Florida Power Corp.*, 107 S. Ct. 1107 (1987), by contrast, the Court considered the Pole Attachment Act and FCC regulations implementing it. Because the Pole Attachment Act did not prohibit utilities from refusing to enter into attachment agreements with cable operators, the Court found that the Pole Attachment Act was not a *per se* taking. *Florida Power*, 107 S. Ct. at 1112. The Pole Attachment Act gives utilities two options: (1) if utilities choose to permit cable attachments to their poles, they are subject to the compensation provisions of the Pole Attachment Act; or (2) if utilities choose not to permit cable attachments to their poles, the Pole Attachment Act does not apply.

---

[19] *See Loretto v. Group W Cable, Inc.*, 522 N.Y.S.2d 543, 546 (1st Dep't 1987), *appeal denied*, 527 N.Y.S.2d 768 (1988), *cert. denied*, 488 U.S. 827 (1988).

The *Loretto* holding is narrow because it focuses on a government-imposed requirement that landlords permit permanent occupation of their property. As noted above, where landlords have already invited or acquiesced to third-party occupation of their property, government regulation of the economic relationship between landlords and tenants is not a *per se* taking. *Loretto*, 102 S. Ct. at 3178. The Court has described this "unambiguous distinction" as the difference "between a commercial lessee and an interloper with a government license." *Florida Power*, 107 S. Ct. at 1112 (1987). Where the government imposes regulations on the landlord's economic relationship with a commercial lessee, it is "settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible." *Id.*

The Court also emphasized the narrow scope of the *Loretto* holding in *Yee*, where it considered a local rent control ordinance. Although the *Yee* petitioners argued that the ordinance deprived them of the ability to choose their incoming tenants, the Court refused to find a *per se* taking.

> Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.

Yee, 112 S. Ct. at 1529. Therefore, under *Yee*, Commission regulation requiring nondiscriminatory access would be constitutionally permissible. Similarly, building owners who have voluntarily opened their property to occupation by one or more telecommunications carriers cannot deny the Commission's statutory authority to assure nondiscriminatory access to other carriers.

Finally, any argument that building owners/managers had no choice but to admit the incumbent LEC is a red herring. Nothing in Section 224 or Level 3's proposed rule requires building owners or managers to permit access to telecommunications carriers or prohibits them from refusing access to all telecommunications carriers.[20] Level 3 doubts that any building owner or manager could demonstrate that they, or their predecessors, denied the incumbent LEC access to their building and forced the incumbent LEC to obtain access by exercising its right of eminent domain. Ironically, the Building Owners and Managers Association has recognized the importance of the very nondiscriminatory access requirement they are fighting so hard to prevent:

> The only "must" found in [the guide for building owners] *Wired for Profit* is that a building owner require every [telecommunications service provider], including the local phone company, to execute a document governing that TSP's rights and actions.[21]

C. A Nondiscriminatory Access Regulation is Not an "Economic" Taking

If a nondiscriminatory access requirement is not a "physical invasion" taking, the regulation must be analyzed under the three-factor ad hoc inquiry outlined in *Lucas*. First, a nondiscriminatory access requirement does not deprive building owners or managers of the economic value of their property because the building owner or manager may set the rate of compensation for access so long as that rate applies to all providers seeking access to the premises. Level 3's proposed rule permits the building owner/manager, rather than

---

[20] *Florida Power*, 107 S. Ct. at 1111-12 & n. 6 (rejecting utilities' contention that they were powerless to deny access to all cable systems in order to escape rate regulation).

[21] BOMA International, *Wired for Profit: The Property Management Professional's Guide to Capturing Opportunities in the Telecommunications Market*, Forward (1998).

the Commission, to determine what constitutes just compensation for access to the building. Once the building owner/manager sets the rate, they will be compensated by all telecommunications service providers, including the incumbent LEC, that obtain access to their building.

Second, a nondiscriminatory access requirement does not interfere with or diminish in any way a building owner's investment expectations because the owner has entered the business expecting rent from tenants, not from the provisions of telecommunications services to tenants. To the contrary, a nondiscrimination requirement will enhance the value of MTEs because building owners will be able to offer their tenants greater choice in telecommunications service providers and receive reasonable fees from multiple carriers.

Third, a nondiscriminatory access requirement would substantially advance the legitimate Congressional and Commission interest of opening local telecommunications markets to competition. The courts have made clear that a broad range of governmental regulations qualify as "legitimate state interests" that justify regulating the economic relationship between a landlord and tenant. Various economic restrictions -- ranging from scenic zoning, landmark preservation, and residential zoning[22] to prohibiting discrimination based on race in places of public accommodation[23] -- have all been upheld against takings challenges. As the Supreme Court recognized, the 1996 Act "profoundly affects a crucial

---

[22] *See Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3147 (1987) (citing cases).

[23] *Heart of Atlanta Motel, Inc. v. U.S.*, 85 S. Ct. 348 (1964).

segment of the economy worth tens of billions of dollars."[24] Congress, recognizing the importance of the telecommunications industry, stated that its purpose in adopting the 1996 Act was to provide a

> pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.[25]

A nondiscriminatory building access rule advances this legitimate state interest while still providing building owners and managers compensation for the use of their property.

D. The Commission's Statutory Authority Over Rights-of-Way Encompasses a Nondiscriminatory Access Requirement

If the courts were to construe a nondiscriminatory access requirement as a compensated taking that comported with the Constitution, the Commission could justify its takings authority by the express and implied terms of Section 224. With respect to incumbent LECs, the Commission's authority to regulate rates for access is explicit in Section 224. With respect to building owners and managers, the Commission's authority to regulate rates for access is implicit in Section 224. As explained above, any Commission-imposed requirement on incumbent LECs to provide unbundled access to inside wiring, in-building conduit, and private rights-of-way is meaningless if a building

---

[24] *Iowa Utilities Bd.*, 119 S. Ct. at 738.

[25] Telecommunications Act of 1996, Conference Report, Rpt. 104-458, 1 (1996).

owner/manager retains the right to deny a competitive carrier access to the building where the facilities and rights-of-way are located.[26]

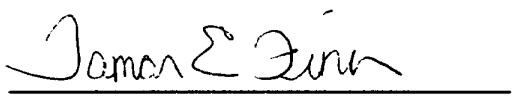
Building owners and managers would be hard pressed to argue that a nondiscriminatory access rule that allows the market to set rates does not afford them just compensation. Under Level 3's proposed rule, the Commission would not set the level of compensation paid to the building owner/manager, but rather would allow the building owner/manager to negotiate the amount of compensation. The building owner/manager would be free to negotiate compensatory rates for the telecommunications service provider's access to and use of the property so long as those rates are applied equally to all telecommunications service providers.

[26] *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (takings authority may be implied where the grant of statutory authority would be defeated unless takings power were implied).

V. Conclusion

As detailed in these comments, the Commission has the authority to adopt a nondiscriminatory building access requirement and to require incumbent LECs to provide access to inside wiring, in-building conduit, and private rights-of-way. Level 3 urges the Commission to promptly adopt regulations to implement the full scope of Section 224 and provide facilities-based competitive LECs with meaningful access to the last 100 feet of the local loop.

Respectfully submitted,



Patricia Paoletta
William P. Hunt, III
Level 3 Communications, LLC
1025 Eldorado Drive
Broomfield, CO 80021

Andrew D. Lipman
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

CERTIFICATE OF SERVICE

I , Tamar E. Finn, do hereby certify that on this 27th day of August, 1999, a true and correct copy of Level 3 Communications, LLC's Comments in CC Docket No. 96-98 and WT Docket No. 99-217 were served on the following via hand delivery:

Magalie Roman Salas, Secretary (Orig. + 6)
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

International Transcription Services, Inc.
445 Twelfth Street, S.W.
Room CY-B402
Washington, D.C. 20554

Tamar E. Finn